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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1698

WILBERT JACKSON,

Petitioner,

—v.—

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Determination Below

The decision of the New York Court of Appeals (Petition, 1a) is reported at 33 N Y 2d 958. The decision of the New York Supreme Court, Appellate Division, Second Department (Petition, 2a) is reported at 41 A D 2d 646.

Jurisdiction

The jurisdictional requisites set forth in the petition (Petition, p. 2) are not adequate to sustain jurisdiction in this Court.

Question Presented

Does petitioner's dismissal from service as a Transit Police Lieutenant after hearing, on a sustained charge of repeated and wilful refusals to obey lawful orders of his superior officer relative to the removal of a "goatee" present an issue which rises to the dignity of a constitutional question?

Statement

The facts are substantially as set forth in the petition—except that the dismissal was based not only on petitioner's repeated failure to obey the orders to cut his goatee but also on the basis of other charges, i.e., failure to produce his identification and off-duty revolver when ordered by his superiors to do so. Furthermore, the case reached the New York State Court of Appeals not because, as petitioner states, a constitutional question was involved but because petitioner had an absolute right to an appeal to the State's highest court because of a dissent in the court below. Cf., CPLR §5601(a).

The litigated issue here was whether the repeated failure to obey orders issued by superior officers was proper ground for dismissal.

The Court of Appeals found that the petitioner was properly dismissed. The matter never rose to the dignity of a constitutional question. Cf., *Matter of Greenwald* v. *Frank*, 40 A D 2d 717 (2nd Dept., 1972), aff'd 32 N Y 2d 862 (1973).

Proceedings in the New York Courts

Petitioner was afforded a hearing in accordance with the provisions of New York State Civil Service Law, §75. This statute inhibits removal or other disciplinary action to the benefit of a broad class of public employees, including the petitioner, except for incompetency or misconduct shown after a due process hearing on stated charges.

The proceedings in the courts of New York were brought pursuant to Article 78 of the N. Y. Civil Practice Law and Rules to review the findings of guilt and the respondent's determination dismissing petitioner from service (R-A 18-20).* Under Article 78 (CPLR §7801 *et seq.*) the State Court had the power to decide whether the determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed, and whether the determination made as a result of a hearing held, and at which evidence was taken pursuant to direction by law is, on the entire record supported by substantial evidence. (Cf., §7803, subds. 3 & 4.) The State Court also had the power to make a broad review of the factual issues presented including a searching inquiry into the validity of any State or Federal Constitutional issues. Cf., *Matter of Di Maggio* v. *Brown,* 19 N Y 2d 283 (1967); *Matter of Finn's Liquor Shop, Inc.* v. *State Liq. Auth.,* 24 N Y 2d 647 (1969), cert. den. 396 U.S. 840 (1969).

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* Numbers and letters in parentheses, unless otherwise indicated, refer to the pages of the Record on Appeal in the New York Court of Appeals.

POINT I

The decision below is based on adequate and independent state grounds and is, therefore, not subject to review in this Court.

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C.A. §1257(3) on the ground that his dismissal from service as a Transit Police Lieutenant was based "solely" on his failure to remove a "goatee" violated his rights under the First and Fourteenth Amendments.

It is clear, however, that the Authority discharged petitioner from employment on two separate sustained charges, one of which involved his repeated failure to obey the lawful orders of his superiors to remove his "goatee". In the courts of New York he questioned only the sustained charge of failing to comply with the grooming regulation without any prior attempt to test the validity of the regulation in the New York courts.

This Court, "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn,* 324 U.S. 117, 125 (1945) [and cases cited therein]. This basic policy stems from judicial reluctance to render advisory opinions by permitting the interjection of so-called "constitutional issues" into controversies which state tribunals have resolved primarily in terms of state law. Whether the non-federal ground on which the state court relied is right or wrong is not of concern to this Court. "It is enough that it is, at least, not without fair support." *Fox Film Corp.* v. *Muller,* 296 U.S.

207, 209 (1935). The decision of the New York courts, in the proceeding at bar was based squarely and exclusively on independent and adequate grounds of state law.

The burden of establishing jurisdiction is not met if "it appears that the judgment [below] *might* have rested on a nonfederal ground," *Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952). This Court is not concerned with the scope of review which state tribunals choose to accord the decisions of administrative or quasi-judicial bodies. This is a matter exclusively for the courts of the state. *Black* v. *Cutter Laboratories,* 351 U.S. 292 (1956). Cf., also *Matter of Vetere* v. *Allen,* 15 N Y 2d 259 (1965), cert. den. 382 U.S. 825 (1965). It follows that the state court judgment based on an adequate and independent nonfederal ground presents no question for review by the Court, even though a federal question might possibly have been involved. *Fox Film Corp.* v. *Muller, supra; Berea College* v. *Kentucky,* 211 U.S. 45 (1908).

POINT II

Enforcement of the text of Directive 25 which, *inter alia* prohibited the growth of "goatees, beards or other chin adornments" presents no substantial federal question.

The two asserted reasons which petitioner presents for the grant of certiorari are (1) an alleged "conflict" of decisions between the New York Court of Appeals and the Second Circuit Court of Appeals and (2) the asserted "significance" of the issues presented in the case at bar. We will consider these issues in inverse order presented in the petition.

The Decision Below Was Clearly Correct and Presents No Significant Issues for Review by This Court

Petitioner pleads the defense of justification, as he did in the Courts of New York, to the primary sustained charge of wilful and repeated refusal to obey the lawful orders of his superior. The orders directed him, on separate occasions in both 1970 and 1971, to comply with the provisions of the Transit Police Department grooming regulation and to remove a "goatee." The "significance" of this defense is allegedly grounded on petitioner's contention (Br., pp. 8-9) that the state may not deprive a person of his employment for refusing to obey a command where such command is "unlawful or arbitrary" or where obedience would violate the Constitutional rights of the employee citing *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957). According to petitioner (*id.*), the order in question was arbitrary because he felt that it was unrelated to his work as a police lieutenant and his dismissal based on non-compliance was unconstitutional as a deprivation of due process or equal protection. Neither contention is valid.

Policemen like teachers, lawyers and students are "not relegated to watered-down versions of constitutional rights." *Garrity, et al.* v. *New Jersey,* 385 U.S. 493, 500 (1967). Cf., also *Gardner* v. *Broderick,* 392 U.S. 273 (1968). However, it does not necessarily follow that a policeman has or retains the same constitutional right as a teacher or a lawyer or a student to determine his own personal appearance while serving the public interest whether in or out of uniform. Indeed, as the United States Court of Appeals recently observed in *Stradley* v. *Andersen,* 349 F. Supp. 1120 (D.C. Neb., 1972), aff'd 478 F. 2d 188, 190-191 (8th Cir., 1973), in sustaining the validity of a virtually

identical police grooming regulation against a due process challenge:

> [1, 2] We reject the idea that community standards provide a legitimate basis in weighing constitutional rights guaranteed to the individual. Whether public acceptance or rejection of a particular hair style exists in one community or another should not be a standard of concern to a federal court. What must be controlling to the court in evaluating competing interests is whether the policy of the state espouses a societal interest which outweighs the individual concern. Thus, what is essential here is that the Public Safety Department stresses the need for public respect of its officers and that it feels such respect flows in part from the officers' individual appearance. If Chief Andersen misjudges, as plaintiff suggests, what necessary measures should be taken to achieve community respect, this basically must be the department's concern, not ours.
>
> [3] One may argue that how one wears his hair has little to do with whether an officer might effectively apprehend criminals or otherwise fulfill his assigned mission as a policeman. This misses the mark. The critical factor is that police officialdom deems it necessary that the officer be well disciplined and that as part of that internal discipline, he be required to maintain a neat appearance. The degree of that appearance, as long as it is not arbitrary or unreasonable, should not be the court's concern.

Cf., also *Matter of Krolick* v. *Lowery,* 32 A D 2d 317, 322 (1st Dept., 1969), aff'd 26 N Y 2d 723 (1970), cert. den. *sub nom. Vyse et al.* v. *Lowery,* 397 U.S. 1075 (1970); *Matter of Lederman* v. *New York City Transit Authority,*

35 A D 2d 996 (2nd Dept., 1970), lv. to app. den. 28 N Y 2d 489 (1971), rearg. den. 29 N Y 2d 749 (1971), cert. den. 405 U.S. 995 (1972); *Matter of Greenwald* v. *Frank, supra.*

No serious contention may be made that the enforcement of Directive 25 in this case constituted a deprivation of equal protection of the law. On this point petitioner relies (Br., p. 8) on the fact that he is a "black man" and "has been deprived of his permanent civil service status because of his insistence on his right" to wear a "goatee." But no allegation is made that petitioner was singled out or that the respondent permits other Transit Patrolmen, white, black or Hispanic, to determine their own grooming standards. It is submitted that the requirements of equal protection of the law are met. *Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459 (1947), rearg. den. 330 U.S. 853 (1947). Cf., also *Brooks* v. *School Dist. of City of Moberly, Mo.,* 267 F. 2d 733 (9th Cir., 1959), cert. den. 361 U.S. 894 (1959); *Byrd* v. *Sexton,* 277 F. 2d 418 (8th Cir., 1960), cert. den. 364 U.S. 818 (1960).

The answer to petitioner's related contention (Br., pp. 12-13) that his rights under the First Amendment (the growing of a beard was characterized in the Courts below as "a symbolic expression"), as protected by the Fourteenth Amendment, were violated, may be found in the United States Court of Appeals ruling in *Dewey* v. *Reynolds Metal Co.,* 429 F. 2d 324 (6th Cir., 1970), aff'd by this Court, 402 U.S. 689 (1970). Dewey entered the employ of Reynolds before he acquired his religious beliefs as a Sabbath observer. His employer sought to accommodate its employees by interpreting a collective bargaining agreement to permit any employee assigned to overtime to be relieved from the assignment simply by arranging for another qualified employee to replace him. When Dewey re-

fused the overtime assignment and declined to arrange a suitable replacement, he was discharged.

The District Court directed Dewey's reinstatement on a holding that his right to freedom of religion had been violated. The Court of Appeals reversed on a finding (at p. 335) that religious discrimination could not be equated with a failure to accommodate, that the employer's accommodation was reasonable and that an "employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees."

A similar set of facts was also presented to the New York Court of Appeals in *Eastern Greyhound* v. *Division of Human Rights,* 27 N Y 2d 279 (1970). In that case the Court affirmed a determination annulling a sustained civil rights complaint of refusal to hire for "creed". There the complainant was refused a job as a baggage clerk because he declined to shave off his beard which his religion required him to wear. The Court found (at p. 283) that the company policy requiring employees to be "clean-shaven" rested "on a desire to promote business by greater public support (and) could justify the exclusion" of bearded applicants and "have no possible religious connotation." So in the case at bar, the directive was reasonable and necessary to "create a uniform appearance * * * and to insure that each officer has a professional appearance," an essential "to engendering public confidence and respect" (R-A 132-133). Such "uniform" appearance has been held to be essential, in *Stradley* v. *Andersen, supra* (349 F. Supp. at p. 1123) so "that the public (may) be able to recognize police officers immediately." That Court found it to be apparent "that any hesitation (on the part of the public) in seeking assistance or cooperating with officers because of

the unique position of policemen could mean the difference between life and death."

There Is No Present Conflict of Decisions Warranting a Review by This Court

Petitioner's second ground for the grant of certiorari is an asserted conflict of decisions between the New York Court of Appeals, in *Matter of Greenwald* v. *Frank*,* *supra*, and the Second Circuit, United States Court of Appeals decision in *Dwen* v. *Barry*, 483 F. 2d 1126 (1973). The Second Circuit, however, as yet to rule on the Suffolk County Police grooming regulation.

In the *Dwen* case, a Suffolk County, New York, patrolman commenced a civil rights action to invalidate a hair grooming regulation of that county's police department. The District Court, in 336 F. Supp. 487, denied a preliminary injunction and summarily dismissed the action. But on appeal the Second Circuit reversed, rejecting the District Court's summary dismissal of plaintiff's complaint. The scope of the Second Circuit decision was as follows (483 F. 2d at p. 1130):

> "We hold only that choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation."

In directing a trial on the issue "of establishing a genuine public need for the regulation" the Court emphasized (at p. 1131) that "[w]e imply no views on the merits."

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* In the case at bar, the New York Court of Appeals unanimously affirmed the order of the Appellate Division, Second Department "on the authority of *Matter of Greenwald* v. *Frank*" (Petition 1a).

On remand and after a trial in which evidence was offered to show that the regulations served the dual purpose of "safety and morale", the District Court (MISHLER, J.) rendered an opinion (Respondent's appendix, pp. 13-16) finding that "with the exception of the general requirement that hair, sideburns and moustaches (must) be neatly trimmed, the regulations do not provide standards for proper grooming." The District Court concluded, therefore, that the Suffolk County Police Department failed to establish a legitimate state interest requiring these restrictions and that the regulations were violative of due process as "an arbitrary limitation and a purposeless restraint." This decision, not yet appealed to the Second Circuit, would seem to be contrary in result to the Eighth Circuit opinion in *Stradley* v. *Andersen, supra,* where there was proof, as there is in the case at bar, that public respect "flows in part from the officer's general appearance." In accord, *Matter of Greenwald* v. *Frank, supra.* On these facts no conflict of decisions warranting review by this Court has been presented. Cf., *United States* v. *Constantine,* 296 U.S. 287 (1935).

Since justification for the respondent's grooming regulation in the case at bar did not rest on the needs of discipline alone nor on an alleged "safety and morale" issue, we submit that the criteria to be applied are not the same as that applied in student "hair" cases. Cf., *Breen* v. *Kahl,* 419 F. 2d 1034, 1036 (7 Cir., 1969), cert. den. 398 U.S. 937 (1970). The Courts have sustained the right of a student to "do his thing" by wearing his hair at such length as he determines. This, however, should not be used to overturn a police grooming regulation in view of the demonstrated countervailing State interest and concern in a disci-

plined and efficient police force. Cf., *Brukiewa* v. *Police Commissioner of Baltimore City,* 263 A. 2d 210 (Ct. of App. Md., 1970). This interest offsets petitioner's private interest to determine his own personal appearance and the enforcement of the regulation presents no issue which rises to the dignity of a Constitutional question. *Graves* v. *Minnesota,* 272 U.S. 425 (1926); *Walton* v. *City of Atlanta,* 181 F. 2d 693 (5 Cir., 1950), cert. den. 340 U.S. 823 (1950).

CONCLUSION

The petition for writ of certiorari should be denied.

June 10, 1974

Respectfully submitted,

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